In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1194

ENRIQUE PEREZ, PETITIONER

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PEREZ *vs.* CALIFORNIA No. 1194, October 1967

DOCKET ENTRIES

January 26, 1965	Sacramento Municipal Court	Complaint Filed
February 11, 1965	Sacramento Municipal Court	Held to Answer
February 16, 1965	Sacramento Superior Court	Information Filed
February 25, 1965	Sacramento Superior Court	Public Defender Appointed
March 3, 1965	Sacramento Superior Court	Arraignment
March 11, 1965	Sacramento Superior Court	Motion to Dismiss Denied
April 13, 1965	Sacramento Superior Court	Jury Trial
May 10, 1965	Sacramento Superior Court	Sentenced
May 10, 1965	Sacramento Superior Court	Notice of Appeal
July 2, 1965	District Court of Appeal (Third District)	Counsel Appointed
November 15, 1965	District Court of Appeal (Third District)	Appellants Opening Brief Filed
February 2, 1966	District Court of Appeal (Third District)	Respondent's Brief Filed
February 9, 1966	California Supreme Court	Transfer to Fifth District Court of Appeal
May 4, 1966	District Court of Appeal (Fifth District)	Opinion
May 18, 1966	District Court of Appeal (Fifth District)	Petition for Rehearing Filed
May 31, 1966	District Court of Appeal (Fifth District)	Petition for Rehearing Denied
June 10, 1966	California Supreme Court	Petition for Hearing Filed

DOCKET ENTRIES

June 29, 1966	California Supreme Court	Hearing Granted
July 8, 1966	California Supreme Court	Counsel Appointed
September 29, 1966	California Supreme Court	Ordered on Bank Calendar
November 1, 1966	California Supreme Court	Oral Arguments
November 3, 1966	California Supreme Court	Respondent Filed Additional Authorities
January 27, 1967	California Supreme Court	Opinion—Affirmed
February 27, 1967	California Supreme Court	Remitturer Issued

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

MINUTE ENTRY OF MAY 10, 1965

WILLIAM M. GALLAGHER
JAMES L. KERINS

Dept. 2

29010

PEOPLE *vs.* ENRIQUE PEREZ

Information for Robbery
Deft Found Guilty 4 Cts 1st Degree
Probation Hearing & Sentence

Deputy District Attorney A. NOLAND and defendant ENRIQUE PEREZ with his counsel T. CARROLL Deputy Public Defender. Present. This being the day fixed for hearing on probation and pronouncing of sentence upon defendant. The report of the Probation Officer being filed, the application for probation being considered by the Court, same is hereby DENIED. Counsel for the defendant made a motion for a new trial and IT IS ORDERED that the same be DENIED.

There being no legal cause why judgment and sentence should not be pronounced.

The Court Ordered that the defendant be confined in the California State Prison for the term prescribed by law for the crime of ROBBERY of the 1st Degree as charged in Counts,1,2,3 & 4 of the Information. Defendremanded to the Sheriff who is directed to deliver said defendant to the California Medical Facility at Vacaville, California

(Judgment Book 100 A—Judgment No. 908)

Upon motion of counsel for the defendant IT IS ORDERED that the Instructions—GIVEN and NOT GIVEN and the Argument be included the Transcript on Appeal, when it is made up.

DEPT. No. 2 CASE NO. 29010

In the Superior Court of the State of California

IN AND FOR THE COUNTY OF SACRAMENTO

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs

ENRIQUE PEREZ

Defendant.

Hon. WILLIAM M. GALLAGHER (Judge of Superior Court)

A. NOLAN (District Attorney)

T. CARROLL (Counsel for Defendant)

This certifies that on the 10th day of MAY, 19 65 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 29010 Count No. 1,2,3 & 4 he was convicted by Jury (Court or Jury); on his plea of Not Guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of ROBBERY of the FIRST DEGREE as to Counts 1,2,3 & 4 (designation of crime and degree, if any, including fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of 211 a of the Penal Code of the State of California (reference to Code or Statute, including Section and Sub-section);

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION
Mar 5,1962	Sacramento,Calif.	Robbery -1st Degree	Calif.Youth Authority
Mar 5,1962	Sacramento,Calif.	Robbery -1st Degree	Calif. Youth Authority

Defendant was (was) or (was not) charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

908

CA-76 (REV.)

Defendant was not (was) or (was not) adjudged a habitual criminal within the meaning of Sub-division (a) or (b) of Section 644 of the Penal Code; and the defendant (is) or (is not) a habitual criminal in accordance with Sub-division (c) of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the County of Sacramento and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows: (Note whether concurrent or consecutive as to each count) Consecutively as to Counts 1 and 2 ; Concurrently as to Counts 3 & 4

and in respect to any prior incompleted sentence (s) as follows: (NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions):

To the Sheriff of the County of Sacramento and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at California Medical Facility--Vacaville,Calif. at your earliest convenience.

Witness my hand and seal of said court

this 10th day of MAY, 1965.

C.C. LA RUE County Clerk

by James L. Keene Deputy

SEAL

State of California, } ss.
County of Sacramento

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 10th day of May 1965.

C.C. LA RUE, County Clerk - By James L. Keene Deputy
County Clerk and Ex-officio Clerk of the Superior Court of California in and for the County of Sacramento.

The Honorable: William M. Gallagher
Judge of the Superior Court of the State of California, in and for the County of Sacramento

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

Crim. 10180

THE PEOPLE OF THE STATE OF CALIFORNIA, RESPONDENT

vs.

ENRIQUE PEREZ, APPELLANT

Filed June 24, 1965, By W. Kramer,
Clerk, Court of Appeal, 3rd District

REPORTER'S TRANSCRIPT ON APPEAL—April 19, 1968

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF SACRAMENTO

HON. WILLIAM M. GALLAGHER, JUDGE

APPEARANCES:

For the People:

THOMAS C. LYNCH, Attorney General of the State of California
Library Courts Building
Sacramento, California

For the Appellant:

ENRIQUE PEREZ, in propria persona

* * * * *

[fol. 444] TESTIMONY OF

ENRIQUE PEREZ, defendant, witness appearing on his [fol. 445] own behalf, having been previously sworn.

CROSS-EXAMINATION (Continued)

* * * *

[fol. 449] MR. CARROLL: I ask it be stricken.

THE COURT: It will be stricken.

Q (By Mr. Noland): Did your mother ever tell you they were looking for you two or three days prior?

A My mother said somebody—one morning somebody came looking for me. She didn't say who it was.

Q How did you know it was these two?

A I don't.

Q Did—were you at Sylvia Moreno's on the 13th with them?

MR. CARROLL: I will object to this as being beyond the direct.

THE COURT: Read the question back.

(Record read.)

MR. NOLAND: Your Honor, I don't believe under the—

THE COURT: (Interposing) I'm going to sustain it. Specify the time you were speaking of.

Q (By Mr. Noland): All right. This is around 1:00, 1:30 in the morning on Wednesday, the 13th of January, 1965. Weren't you at Sylvia Moreno's with David Perez and Joe Jordan?

MR. CARROLL: I would object to this question as being beyond the scope of direct-examination.

MR. NOLAND: If I—

[fol. 450] THE COURT: (Interposing) Just one moment. It's beyond the scope of direct-examination.

MR. NOLAND: Under the—

THE COURT: (Interposing) What is the purpose of your question?

MR. NOLAND: What is the purpose of my question? Putting them together a few moments after the robbery of Ralph's Bar.

THE COURT: Beyond the scope of direct-examination. Objection sustained.

MR. NOLAND: Those are direct acquaintances with them, and his mother brought it up.

THE COURT: Yes. On that day there is considerable testimony, but on the date of this specific alleged crime there was nothing elicited on direct-examination on that day, or pertaining to their association on that day.

MR. NOLAND: I understand it's up to the Court to decide how the direct was, but it is material.

THE COURT: Well, the reason I sustained it is because there are separate crimes being tried together. There is no direct testimony bearing on this one from this witness. Objection sustained.

Q (By Mr. Noland): You purchased—strike that.

Your Honor, also these items of clothes were bought prior to this time, and found there later. I don't see how we can take a section of time out of the middle of this thing and say that people can't cross-examine him on it [fol. 451] because of the relating matters. As far as the clothing is concerned, having been bought prior to the 13th and left there, found on the 15th, and the People's theory of the case is—

THE COURT: (Interposing) You are only permitted to cross-examine this witness regarding testimony within the limits that he gave on direct-examination.

MR. NOLAND: All right.

THE COURT: That's the rule of law.

* * * *

[fol. 457] MR. NOLAND: Ladies and gentlemen, he takes the stand and says, "I didn't want to admit these things until you prove them to me." He also says and takes the stand and testifies about an alibi on the 3rd, an alibi on the 15th, which limits the People, and they may confuse you and say, "Why didn't Mr. Noland ask him that?" Well, the law restricts me on what I can ask him. If he doesn't mention it on cross-examination, I can't—I mean, on direct-examination—

MR. CARROLL: (Interposing) Your Honor, I would object.

MR. NOLAND: I can't get it on cross-examination.

MR. CARROLL: I would object to this line of argument. I believe that is a comment that is far beyond—the State of California makes the exception in the recent case of Modesto.

THE COURT: You will restrict your comment, counsel, to within the law, and—however, he may make comment on the facts in evidence in this case, and on the evidence that was elicited, and that which was not elicited is not fair comment.

MR. CARROLL: I realize that, your Honor.

[fol. 458] THE COURT: All right. Proceed.

* * * *

[fol. 461] MR. NOLAND: They were together minutes after the Ralph's robbery at the place where all of these items, paraphernalia that were used in the robbery were found, and in spite of this the defendant doesn't say a word about it on the stand. He won't explain it to you. So Sylvia Moreno's testimony stands unexplained and uncontradicted, and as I have already told you, I cannot cross-examiner because he chose to sit silent. The same as if he did not take the stand on that particular count. But the Court will instruct you that you may consider those things that you feel that he should have given an explanation to, you may consider that in weighing the evidence—the testimony as to whether it is more probable that he was telling the truth, or Sylvia Moreno is telling the truth about them being together, or the conclusions that you can deduct therefrom that are either favorable or unfavorable to him.

So let's do it again. Sylvia Moreno puts them together after the Ralph's Market. Not just out in the street somewhere, but together where two days later the officers found all of this robbery equipment. Guns, hats, coats, and things, and the defendant doesn't choose to talk about it on the stand or give you any explanation.

Now, ladies and gentlemen, the defendant has admitted to you that—he only tells you what he wants you to know. He said that on the stand. He says, "I don't talk about the forgeries. I didn't tell the police about the for-

[fol. 462] geries. I didn't want them to know about the forgeries." There are objections to them coming into

evidence here. Objection to the license number and that evidence, and all these things come in over strenuous objections, and I'm trying to fight all the way. Anyway, they are put before you in spite of these objections. Oh, he says, "Yes, I admit those." He selects what he wants to testify about on the stand, to give you only half of the story, or part of the story. He won't tell you all the story there. He has been convicted of an armed robbery before, which the Court will instruct you does have bearing. If you—in other words, you may consider that as to whether or not you believe anything he says, the fact that he has a prior conviction. So I say that you cannot believe what he has told you at all because of his selective testifying. His admitting to you that he tells you only what he wants you to know, and the fact that he has this prior conviction.

* * * *

[fol. 524] THE COURT: It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more [fol. 525] probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to drawn an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

* * * *

IN THE DISTRICT COURT OF APPEAL
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA

5 Crim. No. 245

THE PEOPLE, PLAINTIFF AND RESPONDENT

v.

ENRIQUE PEREZ, DEFENDANT AND APPELLANT

Filed May 4, 1966, James G. Huggins, Clerk

OPINION

APPEAL from a judgment of the Superior Court of Sacramento County. William M. Gallagher, Judge. Affirmed as to Counts 1 and 2; reversed as to Counts 3 and 4.

Peter G. Fetros for Defendant and Appellant.

Thomas C. Lynch, Attorney General, Raymond M. Momboisse, Deputy Attorney General, and Theodore T. N. Slocum, Deputy Attorney General, for Plaintiff and Respondent.

The defendant, Enrique Perez, was accused of a whole saturnalia of crime in Sacramento. The information under which he was convicted alleged two previous felony convictions for robbery in the first degree committed in March of 1962; they were ultimately admitted by the plea of the defendant. The charges of present crime were stated in four separate counts: the first alleged robbery of $50 from Fred Fauble, the bartender at the Viking Club, on the 3rd day of January, 1965; the second charged robbery of James Monahan at the Corner Market in Sacramento County on January 15, 1965, and the abstraction of $77, a brown leather wallet, and a G. E. radio; counts 3 and 4 grew out of the robbery of Ralph's Bar in Sacramento; count 3 involved the taking of an undetermined amount of money from Ralph's Bar in the lawful possession of the bartender, Ray Biner; and count 4 referred

to money stolen from a guest of the bar, Eli Dragash, on the same date, January 13, 1965. Each of the four counts charged that the defendant was armed with a deadly weapon, to wit: an automatic pistol. The jury brought in a verdict of guilty as to all four charges. It is noteworthy that one David Perez, not related to Enrique, admitted participation in the robberies of the Corner Market and Ralph's Bar by pleading guilty.

The defendant appealed from "the final judgment and sentence made and rendered in said Superior Court on May 10, 1965, and from the whole thereof." This appeal is to be treated as a single appeal from the four counts covered by the judgment. (*People* v. *McDonough*, 198 Cal.App.2d 84, 86-87.)

Appellant presents three arguments for reversal, saying:

(1) That it was prejudicial error for the court and the prosecuting attorney to comment on the failure of the appellant to testify regarding certain counts of the information (*Griffin* v. *State of California*. 380 U.S. 609); (2) that the court committed prejudicial error by allowing evidence concerning the alleged robbery by the defendant of the Modern Variety Store, a crime which was not charged in the information, but which, according to the People, showed plan, design, and characteristic pattern of criminal activity; and (3) that, as a matter of law, there was insufficient evidence to sustain convictions on counts 3 and 4 of the information.

We shall treat these contentions in inverse order. The evidence very clearly establishes the propriety of the conviction on count 1 (the Viking Club robbery), in connection with which the defendant left his fingerprints at the scene of the crime, and on count 2 (the Corner Market robbery), in which there was identification of the defendant as a participant in the crime by eyewitnesses.

Count 1 alleged the robbery on January 3, 1965, of the Viking Club at 1445 33rd Street in Sacramento, at which time $325 in cash, a Shell credit card, and a BankAmericard were stolen. Frederick Fauble was working on the premises as the bartender. One of the participants was

dark complexioned with dark hair and was armed with a small automatic pistol; the other robber was described as being blonde and light skinned; the darker-skinned criminal held a gun on Fauble and ordered him to lie on the floor.

Appellant took the stand and denied the robbery, saying that he had been with his brother, Miguel, and a friend, Joseph Rosales, from 7:30 p.m. on January 3, until 1 a.m. on January 4; this claim was supported by testimony of the brother and of Mrs. Joseph Rosales, but was rejected by the jury.

Enrique Perez admitted that he had made numerous purchases by using the BankAmericard stolen from Fred Fauble, but claimed that he had been given this card in early January by one Robert Gomes, after originally trying to sell it to him; when he used the card he signed the name "Fred Fauble" as buyer.

Among the purchases made by the defendant with the stolen BankAmericard on days closely following the robbery were the following:

On January 4, 1965, it was used to purchase a $24.95 watch from the Ben Franklin Store in Davis; on the same day, the stolen card was used at the IXL, Inc. store at 804 "J" Street in Sacramento, to purchase a pair of black imitation leather gloves similar to those received in evidence; on January 4, 5, or 6, 1965, Fauble's card was used at Devlin's Shoe Den, 1007 11th Street, Sacramento, to purchase the pair of shoes which appellant was wearing in court at the time of the trial; on January 5 and 7, 1965, the credit card was used to purchase gasoline at two different Shell service stations in the Sacramento area for appellant's vehicle bearing license number LDT 141; on January 7, 1965, a black, narrow-brimmed hat was bought from Jim Patterson's Men's Store, 9th and "K" Streets, Sacramento.

Count 2 involves the robbery of the Corner Market at 1700 "V" Street, Sacramento. James Monahan, the store-owner, and his wife were the victims. Appellant took the witness stand in his own behalf and testified to an alleged alibi, which was rejected by the jury. This robbery oc-

curred at about 7 p.m. David Perez was the "heavy set" robber armed with an automatic pistol, who confessed to this crime and also to the holdup of Ralph's Bar. Appellant, the smaller robber with a lighter build, carried an "odd looking," revolver with a "hexagonal" barrel. Both participants wore dark coats and black gloves, probably leather, dark narrow-brimmed hats, and dark pants.

Each of the men held a glove or cloth up to his face during most of the time so that his nose and mouth were covered. Appellant had his hat pulled down to the level of his eyebrows; he went to the counter with gun in hand and said, "This is a stick-up," and he made Mrs. Monahan put all the money from the cash register into a paper bag. Mr. Monahan was ordered to hand over his wallet which contained $14 to $17. The storekeeper testified that appellant said "to drop our hands and not make a move, or not to look at him or he would kill us."

When the appellant walked behind the counter, he dropped the covering from his face, and the Monahans got a momentary full face view. He took Mrs. Monahan's radio from the counter beneath the cash register, and left the store with his partner, David. Besides stealing the radio, the robber took $69 in cash.

Each of the Monahans, in open court, identified appellant as the shorter of the two robbers who held them up.

Counts 3 and 4 are concerned with the robbery of Ralph's Bar at 1730 16th Street in Sacramento, and of a customer there, one Eli Dragash. Here, there was no evidence of fingerprints or of personal identification; the verdicts on counts 3 and 4 depend on circumstantial evidence. There were three participants; they took coins and bills from the cash register; one of the robbers was a large man with a "football-type" build, and the other two were smaller. David Perez, the large man, pleaded guilty to both the Ralph's Bar robbery and the Corner Market robbery; he was wearing a white Halloween mask over the lower part of his face at Ralph's Bar. Neither the bartender nor Dragash was able to look at the faces of the shorter men. Dragash, who was partly blind, testified as to some of the items of clothing worn by one of the participants and the weapon used in the crime.

A criminal conviction will ordinarily not be reversed on insufficiency of the evidence unless it is clear to the appellate court that there is not sufficient substantial evidence, upon any hypothesis, to support the verdict. (*People* v. *Newland*, 15 Cal.2d 678, 681; *People* v. *Hickok*, 230 Cal. App.2d 57, 59.) The jury was in a position to view the witnesses who testified and to weigh the evidence both direct and indirect leading to their verdict, and "[t]his court may not disturb such finding or the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." (*People* v. *Farrington*, 213 Cal. 459, 463-464.)

The appellant contends that the evidence in support of the convictions on counts 3 and 4 (Ralph's Bar) merely raises a suspicion of guilt. However, the record does contain substantial, even though circumstantial, evidence supporting the jury's finding on those two counts. It was stipulated that David Perez was one of the robbers—the one who was said to have had a "foot-ball player" physique. Enrique Perez was with David Perez at Sylvia Moreno's apartment, which was located approximately three blocks from Ralph's Bar, at about 1 or 1:30 a.m. on January 13, 1965; that was just before or just after the robbery. Eli Dragash stated the approximate weight and height of one of the shorter robbers and Ray Biner, the bartender, also estimated the height of one of them; the jury, of course, had a full opportunity to observe appellant. Eli Dragash testified that one of the shorter robbers wore a hat, mask, and a three-fourths length coat and also that he carried a .38 revolver. This dress was identical with, or at least markedly similar to, that worn by appellant in the Corner Market robbery, which took place two nights later in virtually the same neighborhood. The weapons used by the robber in both places were apparently identical in size and shape.

Mr. Dragash was ordered to lie down by one of the shorter robbers, and he was then "frisked." Similarly, in the Viking Club holdup, one of the two relatively short robbers ordered his victim, Fred Fauble, to lie down and he then took Fauble's credit card and other personalty. In the Viking Club robbery, Enrique Perez was certainly

a participant because his fingerprints were found on a cigar box, which he had handled.

While there is difficulty in relying upon this circumstantial evidence, we would not feel justified in interfering with the jury's determination in this case as to counts 3 and 4, except for the violation of the rule set forth in *Griffin* v. *State of California*, *supra*, 380 U.S. 609, 614, as hereinafter discussed.

Appellant next argues that it was prejudicial error to permit evidence of the robbery of the Modern Variety Store in Sacramento on November 10, 1964, allegedly by defendant and another person, as that crime was not charged in the information. Of course, a defendant cannot be tried for any offense other than that specified in the indictment or information (*People* v. *Albertson*, 23 Cal.2d 550, 576), and evidence of collateral crimes is not admissible, except when such evidence is material to the issues before the court. (*People* v. *Brown*, 168 Cal.App.2d 549, 553; *People* v. *Sanders*, 114 Cal. 216, 230.) In this connection, evidence of other crimes may be admitted to show plan, scheme, system, design, or a characteristic pattern of criminal activity by the accused. (*People* v. *Houston*, 219 Cal.App.2d 187, 192-193; *People* v. *Rosoto*, 58 Cal.2d 304, 330; *People* v. *Mims*, 160 Cal.App.2d 589, 597; *People* v. *Peete*, 28 Cal.2d 306, 314-315.)

People v. *Gay*, 230 Cal.App.2d 102, 104, holds that the admissibility of evidence of this type is, generally speaking, a question for the trial court.

The collateral offense allegedly committed by the defendant at the Modern Variety Store has notable similarities to one or more of the four robberies for which appellant was on trial. In the crimes charged in the information as in the Modern Variety Store offense, the robbers were masked in various ways. At Ralph's Bar and the Corner Market, one robber was the taller. In the Viking Club and Corner Market incidents, one robber, short in stature, wore a dark coat or jacket. As in the robberies of Ralph's Bar and the Corner Market, the shorter criminal wore a narrow-brimmed hat and carried a revolver.

In the robberies of Ralph's Bar and the Corner Market and also in the Modern Variety Store holdup, the larger

robber gave the major orders to his victims. In several of the offenses charged, the shorter robber carried on most of the activity involved in gathering the loot. In the Modern Variety Store holdup it was the shorter criminal who went behind the counter, cleared out the currency in the cash register and searched for the money orders. In the Viking Club and Ralph's Bar holdups, a robber of limited height moved the victims out from the bar, made them lie down, and then "frisked" them. In the Corner Market and Viking Club crimes, a short participant went behind the bar and rummaged through the items there in search of something of value in addition to cash.

As in the Modern Variety Store robbery, the perpetrators of the Viking Club and Corner Market holdups sought to steal more than cash. At the Modern Variety Store robbery, they took money orders which they obviously hoped to negotiate. In the Viking Club affair, the participants stole two credit cards from the victim and afterwards used one card repeatedly to buy various articles. In the Corner Market holdup, the shorter robber closely investigated the counter near the cash register and removed Mrs. Monahan's radio. In the Ralph's Bar holdup, the robbers "frisked" their victims and found that the bartender had no wallet and the partly blind customer had only six dollars; but one robber looked around the cash register for other types of property, moving cigar boxes as he did so.

Enrique Perez was implicated in the crime at the Modern Variety Store by his confession to Richard Bostic in his apartment at San Francisco that he had acquired the personal property that day in a Sacramento robbery. Appellant was implicated in the Viking Club robbery by leaving his fingerprints at the scene of the crime and through the use by him afterwards of the stolen Bank-Americard. He was implicated in the Corner Market holdup by eyewitness identification by two of his victims.

The record in its totality substantiates that the Modern Variety Store robbery was similar in significant respects to one or more of the four offenses charged in the information. In admitting proof of the collateral offense, the trial judge, after holding an extensive hearing of the

question out of the jury's presence, cannot be held to have abused his discretion.

Finally, appellant contends that the ruling of the United States Supreme Court in *Griffin* v. *State of California*, *supra*, 380 U.S. 609, 614, requires a reversal. Both the deputy district attorney in his argument and the trial court in its instructions followed the authorization apparently given by the California Constitution (art. I, § 13), and stated to the jury that, while a defendant did not have to take the stand, still, if he did not do so and thereupon try to explain facts of which he must have had knowledge, an adverse inference might be indulged against him. The *Griffin* case holds that a state may not constitutionally permit either a judge or a prosecutor to comment in a criminal action upon a failure of the defendant to testify (U.S. Const., 5th and 14th Amends.). In the *Griffin* case, the trial judge had instructed the jurors that they might consider the defendant's failure to take the stand, and that among the inferences they could draw therefrom, those unfavorable to the defendant were the more probable. Prior to the issuance of that opinion, it had been assumed by the court that the Fifth Amendment prohibited any such comment in federal courts, but that the Fourteenth Admendment did not make the Fifth Amendment applicable in that respect to state trials. (*Adamson* v. *State of California*, 332 U.S. 46.) However, *Malloy* v. *Hogan*, 378 U.S. 1, overruled *Adamson* v. *State of California*, to the extent of making the privilege to remain silent applicable to defendants in state trials; and the *Griffin* case held that the Fifth Amendment "commands the no comment rule" in cases like the present. (See Mishkin, The Supreme Court 1964 Term, 79 Harv. L.Rev. 56, 159-160.)

In the majority opinion, Mr. Justice Douglas suggested that there are many reasons besides guilt which might lead a defendant to decide not to testify; he quoted with approval the following excerpt from Mr. Justice Field's opinion in *Wilson* v. *United States*, 149 U.S. 60, 66:

> "It is not every one who can safely venture on the witness stand, though entirely innocent of the charge

> against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be witnesses, particularly when they may have been in some degree compromised by their association with others, declares that the failure of a defendant in a criminal action to request to be a witness shall not create any presumption against him."

To the argument that a jury would inevitably draw such inferences anyway from a defendant's failure to take the stand, Justice Douglas replied:

> "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."

The *Griffin* case unquestionably applies to the instant action and it warrants a reversal: (1) unless by taking the witness stand and testifying with respect to two of the counts, the defendant waived the constitutional privilege as to all of them, or (2) unless the error was not prejudicial by reason of article VI, section 4½ of the California Constitution. (*People* v. *Bostick*, 62 Cal.2d 820, 823; Witkin, California Criminal Procedure, 1965 Supplement, § 497A, p. 106; § 762A, pp. 141, 142.)

Was there a total or only a partial waiver here of the constitutional right granted by the Fifth Amendment in that Perez did testify as to the charges contained in counts 1 and 2 but did not give evidence with respect to counts 3 and 4? In *Redfield* v. *United States*, 315 F.2d 76 (cert. denied 369 U.S. 803) at page 80, it is said:

". . . the privilege against self-incrimination is one which may be waived (*Hashagen* v. *United States*, 9 Cir., 283 F.2d 345), and such a waiver occurs when a defendant elects voluntarily to testify. *Raffel* v. *United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054."

(See *Dyson* v. *United States*, 283 F. 2d 636, 637.)

In *Johnson* v. *United States*, 318 U.S. 189, 195-196, the United States Supreme Court, speaking through Mr. Justice Douglas, held that in a proper case the privilege against self-incrimination granted by the Fifth Amendment could be waived:

"The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying (*Bruno* v. *United States*, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257) are of course vastly different. *Raffel* v. *United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054. His 'voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all.' 8 Wigmore, Evidence (3d ed., 1940) § 2276 (2). . . . As stated by this Court in *Caminetti* v. *United States*, 242 U.S. 470, 494, 37 S.Ct. 192, 198, 61 L.Ed. 442, L.R.A. 1917F, 502, Ann.Cas. 1917B, 1168, an accused who takes the stand 'may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.' But where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment."

(See *People* v. *Clapper*, 233 Cal.App.2d 34.)

In *Caminetti* v. *United States*, 242 U.S. 470, 494, the United States Supreme Court also said:

"The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the

witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him."

In the instant case, when appellant Enrique Perez took the stand to testify in his own behalf, all of the People's accusations relating to his participation in the four offenses charged had been admitted in evidence. His counsel did not state that the defendant would take the stand only for a limited purpose. But it is now claimed by his counsel that he selectively asserted a privilege against self-incrimination by testifying only as to counts 1 and 2 and remaining completely silent about the charges contained in counts 3 and 4.

The People, on the contrary, contend that the defendant must be deemed to have waived his privilege against self-incrimination as to all counts and that he thus lost any right to have his conviction reversed on the basis of the *Griffin* rule as to any count. We cannot agree with this conclusion of the Attorney General. The constitutional privilege against self-incrimination, in our opinion, applies in full force to each of the separate crimes alleged in an information.

We must, therefore, inquire whether these error of the court and the prosecuting official were prejudicial as to the convictions on counts 3 and 4 within the meaning of article VI, section 4½ of the California Constitution. (*People* v. *Bostick*, *supra*, 62 Cal.2d 820, 823; *People* v. *Steele*, 235 Cal.App.2d 798, 814; Witkin, California Criminal Procedure, 1965 Supplement, § 497A, p. 106; § 762A, pp. 141-142.)

As already pointed out, the evidence proving count 1 (Viking Club) and count 2 (Corner Market), when viewed most strongly in favor of the respondent, as we must after conviction, differs markedly from the evidence separately

considered on counts 3 and 4 (Ralph's Bar); there is strong proof of guilt as to the first two counts, including fingerprints in one and specific identification by two witnesses in the other. On the last two counts, however, there is no such overwhelming evidence, and the showing of guilt is questionable. The test to be applied in measuring the effect of *Griffin* case errors is whether it is ". . . reasonably probable that a result more favorable to defendant would have been reached in the absence of the error arising from the argument of the prosecution and the giving of the instruction on the subject of defendant's failure to testify." (*People* v. *Keller*, 234 Cal.App.2d 395, 399.) With respect to counts 1 and 2, we necessarily determine that the evidence would have compelled conviction irrespective of the errors, but we are forced to reach an opposite conclusion as to the weaker showing on counts 3 and 4; accordingly, the convictions on these two latter counts must be reversed.

The judgment is affirmed as to counts 1 and 2 of the information and reversed as to counts 3 and 4.

/s/ Conley
P.J.

I Concur:

/s/ Stone
J.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

Crim. 10180

THE PEOPLE, PLAINTIFF AND RESPONDENT

v.

ENRIQUE PEREZ, DEFENDANT AND APPELLANT

Filed Jan. 27, 1967, William I. Sullivan, Clerk

SEE DISSENTING OPINION

A jury found Enrique Perez guilty on four counts of first degree robbery (Pen. Code, § 211a.) He admitted two prior first degree robbery convictions. A motion for a new trial was denied, and he appeals from the judgment, contending that evidence of a prior robbery was improperly admitted; that the evidence is insufficient to support his conviction on counts 3 and 4; and that he did not waive his federal constitutional privilege against self-incrimination as to two of the robberies charged by testifying on direct examination as to the other robberies charged and therefore error was committed of the type condemned in *Griffin* v. *California*, 380 U.S. 609.

Count 1 (January 3, 1965, robbery at the Viking Club):

About 9 p.m. on January 3, 1965, two men entered the Viking Club in Sacramento. One of them was armed with a revolver and had a glove over his mouth. After informing the bartender, Frederick Fauble, that "this was a holdup," the robbers took $325, a Bankamericard, and a Shell credit card. Defendant's fingerprints were found on a cigar box that was knocked off a shelf by one of the robbers.

Defendant admitted using the stolen Bankamericard to make various purchases and signing Fauble's name to the sales slips. He testified that one Robert Gomes gave him the card in early January after trying to sell it to him. Defendant denied having been in the Viking Club on the

night of the robbery and testified that he was with his brother, Miguel, and a friend, Joseph Rosales, when the robbery was committed. His alibi was supported by testimony of Miguel and Mrs. Joseph Rosales.

Count 2 (January 15, 1965, robbery at the Corner Market):

About 7 p.m. on January 15, 1965, David Perez (who is not a relative of defendant) and a second man entered the Corner Market in Sacramento. Each man carried a gun and held a glove or cloth over his face covering his nose and mouth. The men demanded money from Mr. and Mrs. James Monahan, who operated the store, and took from them about $69 and a radio. Mr. and Mrs. Monahan identified defendant at the trial as the second robber. They had a momentary full face view of him on one occasion during the robbery when he dropped the covering from his face.

Defendant testified that he was at his home when the Monahans were robbed, and his alibi was supported by testimony of his brother Miguel and his mother.

Counts 3 and 4 (January 13, 1965, robberies at Ralph's Bar):

About 1:15 a.m. on January 13, 1965, David Perez and two other men entered Ralph's Bar, which was in the same general neighborhood as the Corner Market. One of the men carried a revolver. David Perez wore a mask, and one of his companions used a handkerchief as a mask. Ray Biner, the bartender, and Eli Dragash, a patron who was partially blind, were in the bar. The robbers took $6 from Dragash and the money in the cash register. Biner and Dragash were unable to see the faces of the men who accompanied David Perez but described the height and weight of one of his companions, and the jury, of course, had an opportunity to observe defendant.

Defendant was with David Perez at the apartment of David's sister, Sylvia Moreno, about three blocks from Ralph's Bar at 1 or 1:30 a.m. on January 13, 1965, which was just before or after the robbery at that bar. The

weapon used by defendant at the Corner Market robbery, clothing worn by him at that robbery, the stolen radio, and a coat worn by one of David Perez's companions at the Ralph's Bar robberies were found at Mrs. Moreno's apartment.

Prior Collateral Robbery

At 6:45 p.m. on November 10, 1964, two men entered the Modern Variety Store in Sacramento. Both wore stockings that covered their faces, and one carried a rifle. William George, the owner of the store, was working there that evening. The robbers took currency from the cash register, money orders, and a check protector. Some of the stolen money orders were later negotiated.

Items stolen in the Modern Variety Store robbery were left by defendant and one David Hunt at the home of an acquaintance. Defendant stated at that time that they got the items in a holdup in Sacramento.

Defendant objected at the trial to the admission of the evidence of the prior robbery, and the trial court, before admitting the evidence, held proceedings outside the jury's presence at which the court was informed what evidence would be introduced and heard arguments on the matter.

"It is settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge." (*People* v. *Henderson*, 60 Cal.2d 482, 494-495; *People* v. *Woods*, 35 Cal.2d 504, 509; see also *People* v. *Coefield*, 37 Cal.2d 865, 869.) Here the evidence of the prior robbery was relevant on the issue of the identity of defendant as a perpetrator of the robberies charged. The evidence of the prior robbery disclosed a plan, pattern, and modus operandi similar in many respects to those used in the robberies charged. In the prior offense, as in each of the offenses charged, the place robbed was a business establishment in Sacramento, the robbery was committed during the evening or early morning hours, two or three men participated in the robbery, one or more

of the robbers wore a mask, a gun was used in committing the robbery, and no victim was physically injured. It further appears that in the prior robbery and all the robberies charged, except those at Ralph's Bar, property in addition to money was taken, that the Bankamericard taken in the Viking Club robbery was later used by defendant, and that the money orders taken at the prior robbery were likewise later used apparently by one of the robbers.

In view of the striking similarities between the prior offense and the ones charged we are satisfied that the trial court did not abuse its discretion in admitting the evidence. (*People* v. *Adamson*, 225 Cal.App.2d 74, 78 et seq; *People* v. *Renchie*, 217 Cal.App.2d 560, 563; *People* v. *McCarty*, 164 Cal.App.2d 322, 325-327.) There were factual differences between the prior robbery and the ones charged, such as that at the robberies at the Viking Club and Ralph's Bar, unlike the prior robbery, the victims were made to lie on the floor, but it was, of course, unnecessary to prove the prior offense identical in every detail with the crimes charged in order to render evidence of the prior offense admissible. (*People* v. *Rosoto*, 58 Cal. 2d 304, 330; *People* v. *Renchie*, *supra*, 217 Cal.App.2d 560, 563.)

We are satisfied that the evidence is sufficient to support the jury's verdict on each count.

As we have seen, on direct examination defendant gave an alibi with respect to the robberies charged in counts 1 and 2. He did not refer on direct examination to the robberies charged in counts 3 and 4 or the collateral robbery. On cross-examination the prosecution asked a question directed to show that defendant was with David Perez a few moments after the robberies charged in counts 3 and 4, and an objection on the ground that the question was beyond the scope of direct examination was sustained. No questions were asked on cross-examination regarding the collateral robbery. In the closing argument the prosecution made comments on defendant's failure to explain or deny the evidence of his guilt as to counts 3 and 4. The trial court gave an instruction permitting the jury to draw an inference adverse to defendant from his fail-

ure to explain or deny facts within his knowledge.[1] After the verdict was returned the United States Supreme Court rendered its decision in *Griffin* v. *California*, *supra*, 380 U.S. 609, and defendant argues that under that decision the argument and instruction were improper.[2]

In *People* v. *Ing*, —— Cal.2d ——, ——, we stated that *Griffin* v. *California*, *supra*, 380 U.S. 609, "held that the California constitutional provision permitting comment on the failure of the defendant to testify (Cal. Const., art. I, § 13) violated the Fifth Amendment privilege against self-incrimination made applicable to the states in *Malloy* v. *Hogan*, 378 U.S. 1. *Griffin* further declared that 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.' (See also *Malloy* v. *Hogan*, *supra*, at p. 11.) In *Griffin* the defendant had not taken the stand, whereas here defendant testified in his own behalf, and it is necessary to consider to what extent he thereby waived his privilege against self-incrimination.

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[1] The instruction read: "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

[2] The *Griffin* rule is applicable to cases pending on direct appeal at the time it was announced. (See *Tehan* v. *Shott*, 382 U.S. 406, 409, fn. 3; *Johnson* v. *New Jersey*, 384 U.S. 719, 732.)

"Under federal decisions a defendant who takes the stand and testifies in his own behalf waives his Fifth Amendment privilege against self-incrimination at least to the extent of the scope of relevant cross-examination. (*Johnson* v. *United States*, 318 U.S. 189, 195; *Caminetti* v. *United States*, 242 U.S. 470, 494; *Powers* v. *United States*, 223 U.S. 303, 314-316; *Sawyer* v. *United States*, 202 U.S. 150, 165-166; *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316; *Ziegler* v. *United States*, 174 F.2d 439, 446-447; *Branch* v. *United States*, 171 F.2d 337, 338; *Carter* v. *United States*, 19 F.2d 431, 434; see *Brown* v. *United States*, 356 U.S. 148, 154; *DeRose* v. *United States*, 315 F.2d 482, 487.) It matters not that the defendant's answer on cross-examination might tend to establish his guilt of a collateral offense for which he could still be prosecuted. (*Johnson* v. *United States*, *supra*, 318 U.S. 189, 192 et seq.; *Carpenter* v. *United States*, 264 F.2d 565, 569; see McCormick on Evidence (1954), p. 275.)"

As we have seen, on direct examination defendant testified to an alibi with respect to counts 1 and 2 and thus in effect denied the offenses charged in those counts. Cross-examination as to the collateral offense, which disclosed a plan, pattern, and modus operandi similar in many respects to those charged, would have been proper. (*People* v. *Ing*, *supra*, —— Cal.2d ——, and authorities cited therein.) Cross-examination as to the robberies charged in counts 3 and 4 likewise would have been proper. Those robberies, like the collateral robbery, disclosed a plan, pattern, and modus operandi similar in many respects to those charged in counts 1 and 2.

The fact that defendant was then on trial for the robberies charged in counts 3 and 4 does not preclude a determination that the waiver extends to those offenses. To hold otherwise would permit a defendant to withdraw from the crossfire of interrogation before the reliability of his testimony has been fully tested. It is also of importance that the reasons advanced for the privilege are decisively less persuasive when applied to disclosures requested after the accused has voluntarily taken the stand. (See 8 Wigmore on Evidence (McNaughton rev. 1961) § 2276, p. 462.)

In our opinion it was not a violation of the federal constitutional privilege against self-incrimination for the prosecutor to argue and the court to instruct that an inference unfavorable to defendant could be drawn from his failure to explain or deny facts within his knowledge relating to counts 3 and 4 or to the collateral offense. The trial court's instruction was general in terms and permitted the jury to draw an inference unfavorable to defendant from his failure to deny or explain any matters within his knoweldge, but no claim is made that there was any additional matter beyond the scope of relevant cross-examination that defendant failed to explain or deny.

No contention is made that the argument or instruction violated the state constitutional privilege against self-incrimination (Cal. Const., art. I, § 13), nor could such a contention properly be made in the present case. A defendant by testifying in his own behalf waives his state constitutional privilege against self-incrimination to the extent of the permissible scope of cross-examination (*People* v. *Ing*, *supra*, —— Cal.2d ——, and authorities cited therein). Cross-examination with respect to the collateral offense would have been proper under California decisions (*People* v. *Ing*, *supra*, —— Cal.2d ——, and authorities cited therein). Cross-examination as to the robberies charged in counts 3 and 4, which, as we have seen, disclosed a plan, pattern, and modus operandi similar in many respects to those charged in counts 1 and 2, likewise would have been proper.

The judgment is affirmed.

BURKE, J.

WE CONCUR:

TRAYNOR, C.J.

McCOMB, J.

TOBRINER, J.

MOSK, J.

PEOPLE

v.

PEREZ

Crim. 10180

DISSENTING AND CONCURRING OPINION

I concur in part and dissent in part.

The practical effect of the majority opinion is that the prosecution by joining charges of separate and distinct robberies can effectively compel the defendant to testify as to all charges or be subject to adverse inferences where he elects to testify as to one and there is evidence, however weak, from which it can be concluded that the robberies disclose a common plan, pattern, or modus operandi. If this is the law what becomes of the constitutional right to remain silent?

Obviously, if the offenses were separately charged and tried, defendant would have the right to decide in each trial whether to testify or to rely upon his privileges against self-incrimination. I cannot agree that the rules relating to joinder of charges or proof of similar offenses were ever intended or should be applied to deprive a defendant of that constitutional right. Furthermore the majority ignores the fact that the trial court by sustaining an objection to cross-examination effectively ruled that there was no waiver of the privilege, but the majority treats the matter as if the trial court had made a contrary ruling.

Defendant was charged in the first count with a robbery at the Viking Club, in count 2 with a robbery at the Corner Market, and in counts 3 and 4 with robbing the bartender and a patron of Ralph's Bar. He took the stand and denied commission of the Viking Club and Corner Market robberies. He did not testify on direct examination with regard to the robberies charged in counts 3 and 4. When the prosecutor asked on cross-examination a question regarding the robberies charged in counts 3 and 4, the trial court sustained an objection on the ground

that the question was beyond the scope of the direct examination.

In his closing argument, the prosecutor commented on defendant's failure to explain or deny the evidence of his guilt as to counts 3 and 4. The trial court gave an instruction permitting the jury to draw an inference adverse to defendant from his failure to explain or deny facts within his knowledge.

Griffin v. California, 380 U.S. 609, which was decided after the verdict was returned in the instant case, held that such comment and instruction violates the Fifth Amendment privilege against self-incrimination. In concluding that the comment and instruction did not violate the rule of the *Griffin* case the majority reasons that by voluntarily taking the stand and testifying as to the offenses charged in counts 1 and 2 defendant waived his privilege not only as to those offenses but also as to the offenses charged in counts 3 and 4 because all of the robberies disclose a plan, pattern, or modus operandi similar in some respects. The majority finds itself in the anomalous position of affirming the judgment on all counts on the ground that the trial court erroneously limited the cross-examination of the defendant when it sustained the objection to questions relating to the offenses charged in counts 3 and 4.

I am of the opinion that the attempted cross-examination was clearly improper even if the common plan exception were applicable. If this is so, the waiver of defendant's privilege against self-incrimination did not extend to the offenses charged in counts 3 and 4. It is well settled that the breadth of the waiver by an accused who takes the stand in the trial "is determined by the scope of relevant cross-examination." (See Brown v. United States, 356 U.S. 148, 154-155; Johnson v. United States, 318 U.S. 189, 195.) This rule permits a defendant, before taking the stand, to determine the scope of his waiver and to intelligently weigh the alternatives of testifying or asserting his privilege, and, where the prosecution seeks improper cross-examination, it should not be held to come within the waiver. In the instant case, the defendant was thus effectively told by the trial court that the waiver did not extend to counts 3 and 4.

Moreover, in a number of situations this court has recognized that certain evidence, although relevant and admissible for a limited purpose, should be excluded where the prejudice to a defendant from the admission of the evidence will outweigh its probative value and where it cannot be reasonably expected that the jury will confine its consideration of the evidence to the limited purpose for which admission would otherwise be proper. (See, e.g., People v. Aranda, 63 Cal.2d 518, 530-531; People v. Henderson, 60 Cal.2d 482, 494-495; People v. Atchley, 53 Cal. 2d 160, 168; People v. Foote, 48 Cal.2d 20, 23-24.)

In Shepard v. United States, 290 U.S. 96, 104, where the defense introduced evidence that the decedent was contemplating suicide and the prosecution offered testimony that three weeks prior to her death the decedent had said that "Dr. Shepard has poisoned me," the court in holding that the quoted statement should not have been admitted to show state of mind of the decedent stated: "It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." (See also People v. Talle, 111 Cal.App.2d 650, 670.)

These principles have been recognized by this court with regard to evidence of collateral offenses, and we have pointed out that evidence of such offenses carries with it the risk that its probative value may be outweighed by its possible prejudicial effect. (People v. Henderson, *supra*, 60 Cal.2d 482, 495.)

Although ordinarily the question whether possible prejudice warrants exclusion is addressed to the trial court (People v. Henderson, *supra*), permitting the cross-examination in the instant case would have been an abuse of discretion as a matter of law. Of necessity cross-examination of defendant as to the robberies charged in counts

3 and 4 bears directly on the issue of guilt of the robberies charged in counts 3 and 4, and it is obvious that a jury, whether or not given a limiting instruction, will consider such evidence as bearing on the issue of guilt as to those robberies and not merely as bearing on the offenses charged in counts 1 and 2 to which such cross-examination relates merely collaterally. In other words, the advantage, if any, that the prosecution may gain with respect to counts 1 and 2 in eliciting admissions by cross-examination of defendant as to the robberies charged in counts 3 and 4 is clearly outweighed by the risk of prejudice to defendant due to the possibility that the jury will consider such admissions in determining guilt of the charges in counts 3 and 4.

Moreover, even without regard to prejudice to defendant, the trial court's determination that the questioning of defendant as to the robberies charged in counts 3 and 4 was not proper cross-examination must be upheld because of the weakness of the showing that those robberies disclosed a plan, pattern, or modus operandi similar to the robberies charged in counts 1 and 2.

The majority summarizes such showing with regard to the four offenses charged and a prior offense as follows: "In the prior offense, as in each of the offenses charged, the place robbed was a business establishment in Sacramento, the robbery was committed during the evening or early morning hours, two or three men participated in the robbery, one or more of the robbers wore a mask, a gun was used in committing the robbery, and no victim was physically injured.. It further appears that in the prior robbery and all the robberies charged, except those at Ralph's Bar, property in addition to money was taken, that the Bankamericard taken in the Viking Club robbery was later used by defendant, and that the money orders taken at the prior robbery were likewise later used apparently by one of the robbers."

Counts 3 and 4, as pointed out above, relate to the robberies of Ralph's Bar, and those robberies occurred early in the morning, involved three robbers, and resulted in the theft of money only; whereas the other robberies occurred in the evening, involved two robbers, and resulted in the taking of property in addition to money.

I am satisfied that the ordinary principles of appellate review require us to uphold the trial court's determination that the questioning of defendant as to the offenses charged in counts 3 and 4 was not proper cross-examination. Since the questioning did not come within the scope of proper cross-examination, such questioning did not come within the waiver of the privilege, and it was improper for the prosecutor to comment on the fact that defendant did not deny commission of the offenses charged in counts 3 and 4, and it was error for the court to instruct the jury that it could draw an inference unfavorabl to the defendant from his failure to explain or deny facts within his knowledge.

People v. Ing, *ante*, page —, is distinguishable. In that case evidence of collateral crimes of which defendant was not charged was used to show a common scheme or plan. Since defendant was not charged with the collateral crimes, there was, of course, no danger that the jury would misuse the evidence to convict defendant of such crimes. For this reason I have signed the *Ing* opinion.

The misconduct and the erroneous instruction in the instant case require reversal if there is a reasonable possibility that the errors complained of contributed to the conviction. (Cal. Const., art. VI, § 13; Fahy v. Connecticut, 375 U.S. 85, 86-91; see People v. Bostick, 62 Cal.2d 820, 823-827.) The evidence to connect defendant with the robberies charged in counts 3 and 4 as set forth in the majority opinion is weak. Defendant did not testify with respect to those offenses, and I am of the view that there is a substantial likelihood that the misconduct and the erroneous instruction contributed to defendant's conviction of these offenses. A different situation appears, however, as to the offenses charged in counts 1 and 2. There was strong evidence to connect defendant with each of those robberies. Defendant denied commission of those robberies, and neither the misconduct nor the erroneous instruction was directed towards these offenses. Under the circumstances, there is no reasonable possibility that the matters complained of contributed to defendant's conviction of the offenses charged in counts 1 and 2.

I would reverse the judgments of conviction of the offenses charged in counts 3 and 4 and affirm the judgments of conviction of the offenses charged in counts 1 and 2.

PETERS, J.

* PEEK, J.

I CONCUR:

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.